between the lessor and lessee would amount to a grant of fresh tenancy in place of the old one. In the course of his judgment he said that

"In view of the rent increase that undoubtedly took place . . . . the question arises whether or not a new contractual tenancy has superceded when rent was raised by agreement to the higher rate."

A little later he said:—

"I am consequently of the opinion that even if I am bound . . . . in holding that the appellant's tenancy at $5 per month continued after 1958 without interruption, notwithstanding the transfer of Ngo Jin's half-interest, such tenancy no longer exists after it was replaced by the fresh tenancy at the higher rent."

On these authorities I am bound to hold that the appellant, by accepting a new tenancy or lease for 7 years from the lessor during the term of his old monthly tenancy, must be deemed to have surrendered his old one. In fact when the new lease took effect, the appellant ceased to pay his ground rent of $6 in respect of his old tenancy, but instead he paid $50 per month his landlord under the new lease (P-18) and this rent of $50 by another new lease (P-20) was further increased to $90 per month.

Since the 1st lease (P-18) for 7 years was granted to the appellant and Ooi Seang Hee on 16th August 1948 and the 2nd lease (P-20) for a further extended term of 4 years was granted to him and Ng Kek Tong on 31st December 1952 and the building known as No. 93 Campbell Street, Penang, was erected and completed long after the 31st day of January 1948, I hold that the said premises in question are not protected by the Control of Rent Ordinance 1956. I am therefore of the opinion that this appeal should be dismissed with costs here and below, and the deposit of $500 in court be paid out to the respondents towards their costs.

Azmi C.J. (Malaya) and **Pike C.J. (Borneo)** concurred.

Appeal dismissed.

Solicitors: *Jag-Jit Singh & Co.; Jagadeva, Zahir & Ismi.*

MERCANTILE BANK LTD. v. YOON SIEW KANG

[O.C.J. (MacIntyre J.) August 24, 1967]

[Ipoh — Civil Suit No. 2 of 1966]

Bills of Exchange — Cheques — Holder in due course — Delivery — Bills of Exchange Ordinance, 1949, ss. 2, 27, 29(1)(b), 30, 64.

Fraud — Duress — Onus of proof.

Conspiracy — Case to be decided on pleadings.

Negotiable securities — Notice of limited interest of person from whom security taken — Effect of.

Banking — Cheques — Alterations rendering them void as negotiable instruments — Holder in due course.

The defendant was a remisier of M. Ltd. a firm of stock and share brokers, and was related to the directors of M. Ltd. He issued cheques in favour of M. Ltd. who deposited them with the plaintiff as an overnight security. These cheques were returned to M. Ltd. by the plaintiff every morning and sent back to the plaintiff in the afternoon. The plaintiff called in the overdraft and had the cheques indorsed by M. Ltd. in its favour. The six cheques when presented by the plaintiff were dishonoured as the signatures of the defendant differed from the specimen signature. Further there were alterations in the dates on the cheques. The plaintiff claimed against the defendant as holder in due course. The plaintiff had in an earlier suit obtained judgment against M. Ltd. and its claim included the sums in respect of the cheques issued by the defendant. A winding up order was consequently served against M. Ltd. at the instance of the plaintiff before the plaintiff filed the present suit. The defendant contended that (i) the six cheques were not intended to be presented by M. Ltd. except under a specified contingency and that the plaintiff was aware of this restriction on M. Ltd., (ii) the plaintiff was not a holder in due course as the plaintiff did not obtain them in good faith or for value, (iii) the cheques were void because of the alteration of the dates, (iv) the cheques were presented in breach of faith and under circumstances which amounted to fraud, (v) the plaintiff having already obtain judgment in an earlier suit and the judgment included sums due on the cheques, the plaintiff was precluded from suing the defendant for the same amount, alternatively (vi) the action must fail because the plaintiff in presenting the cheques for payment was only acting as an agent for M. Ltd. and there was no consideration between the plaintiff and M. Ltd. in respect of these cheques. On the evidence,

Held: (1) the amounts entered in the cheques were fictitious and the cheques were delivered by the defendant after effecting certain alterations to render them void as negotiable instruments in order to assist M. Ltd. to obtain credit from the plaintiff;

(2) the defendant had failed to discharge the onus of proving fraud or duress in the case;

(3) M. Ltd. voluntarily endorsed the cheques and it must be presumed that it was intended to give effect to that endorsement;

(4) the plaintiff had notice that the cheques were given to M. Ltd. for purchase of shares and if the plaintiff's manager had taken the trouble to scrutinise them he could have found them worthless as negotiable instruments, there was therefore a wilful blindness and absence of enquiry on his part;

(5) when the holder of negotiable securities otherwise *bona fide* and for value takes from person whom he knows or suspects to have a merely limited interest he acquires no larger interest than him from whom he had taken. As such the plaintiff's claim must be dismissed with costs;

(6) it was not necessary to go into the other questions raised in the defence.

Cases referred to:—

(1) *Westminster Bank Ltd.* v. *Zang* [1966] 2 W.L.R. 110.

(2) *Stiles* v. *Guy* 160 E.R. 1137, 1139.

(3) *Earle of Sheffield* v. *London Joint Stock* (1888), 13 App. Cas. 333.

CIVIL SUIT.

N. T. Rajah for the plaintiff.

N. Sharma for the defendant.

Cur. Adv. Vult.

MacIntyre J.: The defendant in this case on various dates between the 23rd and the 29th of March 1965 drew six cheques upon the Jalan Yang Kalsom Branch of the Oversea-Chinese Banking Corporation Limited for amounts totalling $72,591 payable to Messrs. MacPhail & Co. (Ipoh) Limited and crossed generally. These cheques were subsequently indorsed by Messrs. MacPhail & Co. to the plaintiff bank and were dishonoured on presentation. The plaintiff now sues the defendant for the recovery of the said amount as the holder in due course of the six cheques.

Messrs. MacPhail & Co. are a firm of share brokers now under liquidation. The defendant seeks to resist the plaintiff's claim on the following grounds, namely:—

(1) That the plaintiff bank was aware that under an agreement between MacPhail & Co. and the defendant, the six cheques were not intended to be presented for payment except under a specified contingency which had not arisen at the time of the indorsement or subsequently and the plaintiff had therefore not acquired any property in the cheques;

(2) That the plaintiff was not a holder of the cheques in due course as they were not obtained in good faith or for value;

(3) That the cheques were void as the date on each of them had been altered without the knowledge and consent of the defendant;

(4) That the cheques were presented for payment in breach of faith and under circumstances of fraud.

(5) That the plaintiff having obtained judgment against MacPhail & Co. in Ipoh High Court Civil Suit No. 125 of 1965 on the 3rd of May 1965 for $534,922.36 which included the aforesaid sum of $72,591 payable under the six cheques, is precluded by law from suing the defendant for the same amount; and

(6) Alternatively, the action must fail because the plaintiff in presenting the six cheques for payment acted only as an agent for MacPhail & Co. without any consideration passing between the plaintiff and MacPhail & Co. in respect of the said cheques.

To appreciate the points of fact and law raised in the statement of defence, it is necessary to consider the business relationship which subsisted between the plaintiff and MacPhail & Co. on the one hand and between MacPhail & Co. and the defendant on the other prior to the issue of the cheques aforesaid.

MacPhail & Co. (hereinafter referred to as 'MacPhail') were long standing customers of the plaintiff bank. In 1962 and early 1963, the parties exchanged correspondence regarding a request by MacPhail for advances by way of fluctuating overdraft in order to expand their business. The plaintiff agreed to grant overdraft up to a limit of $600,000 in the terms set out in a letter dated the 17th of June 1963 and marked P.23 which reads as follows:—

"M/S. MacPhail & Co. (Ipoh) Ltd.,
Ipoh.
Dear Sirs,

Our London Office have advised us that they have renewed the following limit for one year:—

'1. A LIMIT of $600,000 (with discretionary authority for Ipoh Manager to increase to $8 lacs) for advances by way of fluctuating overdraft.

Security.

The deposit of share scrips and transfers pending deliveries under contract to ultimate buyers.

Collateral Security.

The guarantee of the following gentlemen in their personal capacities (Nos. 1, 2 and 3 being the Directors of the firm):—

1.	Cheng Chuan Shu	$150,000	
2.	Chan Khai Chong	50,000	
3.	Chan Loo Sim	25,000	
4.	Soo Kam Cheong	25,000	$250,000.

Margin 40% calculated on the basis of the day to day market values of the shares so deposited. For the purpose of calculation of the margin first $250,000 may at the discretion of the Ipoh Manager be taken as covered by the guarantees, the balance to be covered by share scrips with a margin of 40% on current market values in hand.

2. A LIMIT of $200,000 for delivery free to the borrowers each morning of scrips and transfers held as security for (1) such scrips and transfers or cash in lieu thereof, to be returned to the bank at the close of business the same day.

Interest 8%.'

Please confirm that the above terms are acceptable to you by signing the duplicate copy of this letter enclosed herewith and returning it to us for our records.

Yours faithfully,
Sgd: ?
Manager "

MacPhail did not confirm acceptance of the terms in writing but did in fact comply with the terms generally and both the parties had thereafter carried on business on the basis of those terms, except that sometime in 1964 the then plaintiff's manager appears to have orally agreed to accept under item 2 in P.23 cheques drawn by third parties in favour of MacPhail in lieu of share scrips and transfers.

It will be seen from P.23 that besides providing personal guarantees MacPhail was required to deposit share scrips with transfer forms signed in blank by the vendors. This appears to be the usual manner in which transfer forms are delivered in order to facilitate direct transfers to third parties. It would appear that it is a common banking custom to allow overdrafts on the security of share scrips. The advantage of this form of security is that the bank could realise the securities by filling the blank transfer forms and selling the scrips in the open market. However, in the case of a brokerage firm the share scrips deposited with the bank would be required in the ordinary

course of business for delivery to their clients or for re-sale at their request. It was to enable MacPhail to fulfil their contractual obligations that the terms under item 2 of P.23 were offered. Share scrips to the value of $200,000 were to be released to MacPhail each morning to be returned at close of business each day. Hence the term 'overnight securities'. If from among the share scrips released, MacPhail had to part with any scrip in the course of the day's business, it was to be replaced by another scrip of equal value or by cash in lieu thereof.

The procedure in regard to the withdrawal and re-deposit of the overnight securities required of MacPhail when forwarding the securities to the plaintiff at the close of business each day to also send a return (hereinafter referred to as 'the overnight statement') stating the nature and value of shares concerned and the amounts secured by cheques and bills. On receipt of the securities and the overnight statement, a bank official would then prepare and file a report giving the plaintiff's assessment of the overnight security position. The amount by which the value of the securities fell short of the amount overdrawn is referred to as a shortfall.

It would appear from the evidence that throughout the year 1964 the business of MacPhail was failing and that the directors had resorted to depositing as security share scrips loaned by friends and clients and also cheques drawn in favour of MacPhail.

Such were the affairs of MacPhail when on the 15th day of January 1965, Mr. Braine (P.W.1) took over the management of the plaintiff's business at Ipoh. He found, to use his own words, a 'perpetual shortfall' in regard to the securities deposited with the bank and called upon the directors of MacPhail to make good the shortfall.

I shall now turn to consider the business relationship which subsisted between MacPhail and the defendant. In April 1961 the latter commenced work for the former as a remisier. By way of emolument he was paid half the brokerage fee received by MacPhail in respect of work introduced by him. In April of the following year, at the request of MacPhail, he deposited a sum of $5,300 by way of security to cover the risk of loss which may be occasioned by the failure of clients introduced by him to fulfil their contractual obligations. Later, by a letter dated the 20th of April 1964, he agreed, *inter alia,* to increase the security deposit to $10,000 by monthly contribution amounting to 10% of his brokerage fee earned each month.

The defendant is personally related to the directors of MacPhail. This is an important fact to be remembered because the control and management of MacPhail in 1964 and 1965 were in the hands of relatives who appear to have run the business as if it were a family concern. The two active directors, namely, Chan Loo Sim (D.W.7), and Chan Kam Yoong (D.W.9), are father and son. The chief clerk, Kwan Kee Yew (D.W.10) is the father-in-law of D.W.9 and the latter's wife was also a member of the staff.

When, therefore, in the early part of 1965, Mr. Braine demanded the shortfall to be made good, the financial affairs of the company reached a crisis. The only alternative left, short of providing personal guarantees by sureties acceptable to the plaintiff, was to make good the shortfall by depositing cheques drawn by third parties. Thus it would appear from the overnight statement that between the 4th and the 31st of March 1965 the amount secured by cheques deposited as overnight securities ranged from $172,000 to $185,000.

In this connection, I must refer to a conflict of evidence between the managing director of MacPhail (D.W.7) and the other director (D.W.9) regarding the deposit of cheques and even share scrips as overnight securities. D.W.7 said in evidence and I quote:—

> "After P.23 was received, the arrangement regarding overdraft was modified orally by the bank manager. This oral arrangement was to the effect that we could, if unable to provide sufficient shares as security, deposit bills and cheques as overnight securities".

Then with reference to the overnight statements submitted by MacPhail to the bank between 5th and 31st March 1965, the witness said and I quote:—

> "It is true that the cheques in respect of which the amounts are showing in the righthand column were deposited with the plaintiff as security for the overdraft".

And finally in re-examination, he said:—

> "The arrangements about deposit of cheques started in 1964. All the cheques D.2, D.4, D.6, D.10, D.11 and D.12 and P.20 were made in favour of MacPhail & Co. When this arrangement was made we agreed to it on condition the cheques were returned to us everyday. I admit that on the strength of these cheques, we got the overdraft we wanted."

D.W.9, on the other hand, totally denied that the share scrips or cheques were deposited as overnight securities. He said and I quote:—

> "The cheques and share scrips daily deposited with the bank were deposited as overnight deposit and not as securities. This was a facility given to the firm in order to safeguard their securities from burglary etc. This practice of depositing securities with the bank was already in operation when I joined the firm."

This witness also said and I quote:—

> "It is not correct to say that we agreed with the bank that where share security was insufficient, then we could provide security by cheques and bills."

I reject the evidence of this witness as being untrue as it is not only in direct conflict with the evidence of the managing director and the chief clerk but it is also belied by the firm's own overnight statements the contents of which he must

have known as a director actively engaged in the management of the business.

According to the bank's assessment of the overnight security position on the evening of the 30th of March 1965, the shortfall amounted to $40,797 (*vide* A46). Thereupon, Mr. Braine decided to act. On the morning of the 31st March, the share scrips deposited as overnight securities were released but not the cheques. By the evening of April 1st, the shortfall had risen to about $70,000. In consequence, even the delivery of the overnight share scrips was stopped. On the 8th of April the plaintiff called in the overdraft. However, before the overdraft was called in the cheques were indorsed by D.W.9 as director of MacPhail at the request of Mr. Braine.

The indorsements were made in the office of Mr. Braine. It was contended on behalf of the defence that D.W.9 had no authority to indorse the cheques by himself alone as the rules of MacPhail provided that a cheque issued by the firm should be signed by two persons. I fail to see how a rule regarding signature on cheques issued by MacPhail applied to the indorsement of cheques paid in by third parties. In the course of these proceedings, D.W.9 maintained that he had, at first refused to indorse the cheques but had yielded later to Mr. Braine's demand because he threatened, otherwise, to call in the overdraft. He further said, and this was not denied, that the official seal of MacPhail was brought to the office at the request of Mr. Braine who had himself affixed the seal on the cheques. Later in his evidence D.W.9 gave a different reason for indorsing the cheques. He said and I quote:—

"The bank manager promised that he would not present the cheques and that was why I indorsed them over to the bank."

It would appear from Mr. Braine's evidence that at that time he had no intention of presenting the cheques for payment because the directors of MacPhail had agreed to provide further security in the form of personal guarantee which they had assured him would be soon forthcoming. His evidence regarding the circumstances surrounding the indorsement of the cheques is as follows and I quote:—

"Put to me that D.W.9 did tell me that he had no authority to indorse these cheques, I say he did not tell me so. I did not on that day threaten to close the accounts. I was hoping to obtain further guarantees. I admit I got the signature first and affixed the seal afterwards. The typed words on the cheques were typewritten after D.W.9 had signed them and left the office. When I obtained the signature and had the words typed, I was only perfecting the bank's securities. I had no intention then of presenting them for payment as I was expecting additional guarantee. D.W.9 did not tell me of the circumstances under which the cheques were obtained by MacPhail & Co. I did not tell D.W.9 that if he signed the cheques they would not be presented for payment."

When Mr. Braine said that he was not told by D.W.9 of the circumstances under which the cheques were obtained, he was referring to the defendant's explanation for depositing the cheques with MacPhail. The defendant had alleged that each cheque represented the value of the shares ordered to be purchased by a client and was deposited by him with MacPhail as security to cover the risk of the client concerned failing to pay for the shares after the order had been executed. The amount secured by the cheque, he contended, was not due and owing until the client had defaulted in paying the purchase price when demanded. The defendant had also produced in evidence a letter (D.13) dated the 14th of March 1965 in proof of this oral agreement with MacPhail. The latter is written on the official note paper of MacPhail and signed by the managing director acknowledging the receipt of six cheques Nos. 766832-35 and 766837-8 amounting to $72,591 for the purchase of 2,000 Gopeng Consolidated and 3,000 Berjuntai, with an undertaking not to present them for clearance until the shares had been purchased and payment confirmed by the defendant. I shall deal with this letter later.

Having seen and heard Mr. Braine and D.W.9, I have come to the conclusion that D.W.9 voluntarily indorsed the cheques. However, I believe that when he indorsed the cheques he was given to understand that the cheques would not be presented for payment but retained as security pending arrangements for additional security to be provided; but unfortunately the guarantee was not forthcoming. According to Mr. Braine and I quote:—

"The guarantor was to be Mr. Chiang Chuan Shu. Mr. Chiang Chuan Shu did not give a further guarantee. On the evening of the 7th of April, we received information of the refusal of Mr. Chiang Chuan Shu to give the guarantee. Consequently, we called in the overdraft."

I shall now deal with the letter D.13. Except for this letter, there is, I must say, a remarkable, if not, an astonishing absence of documentary evidence to prove an agreement between a firm of brokers and a remisier. Why was it that the alleged agreement said to involve the deposit of negotiable instruments as security not reduced to writing? The omission is all the more remarkable when the more simpler agreements regarding security deposits entered into previously are supported by documents as evidenced by A1 and A2. In this case even the relevant cheque butts do not indicate the nature of the transaction in respect of which the cheques were issued. Except for the date and amount and indorsement of initials K.I.V. in some of them, they are blank. D.13 could well have been written as a result of afterthought to make good the deficiency in documentary evidence in this respect. D.13 is admittedly written on MacPhail's note paper and signed by the managing

director but it bears no reference number. Presumably, therefore, a copy of the letter was not retained in any official file. It would also appear from the evidence that the dispatch of this letter was not recorded in the dispatch book of MacPhail because it was handed to him personally in the office. The implication of all this evidence is that except for D.13 itself there is no other documentary evidence available to prove that such a letter was ever written. Finally, D.13 is dated the 14th of March 1965. The letter, of course, had to bear a date prior to the 15th of March because on that date the clients who were said to have placed certain orders for the purchase of shares had cancelled them and the need for MacPhail to retain the cheques no longer existed. If, therefore, D.13 was written long after the 15th of March, the writer in ante-dating the letter was liable to make a slip in regard to the date. Such a slip is evident by the fact that the 14th of March is a Sunday when the office of MacPhail was closed for business. It is admitted by D.W.7, the managing director, that D.13 could not have been typed on the 14th of March but he said that the mistake must be a typing error. In view of the surrounding circumstances, his explanation was far from convincing. Besides, if D.13 had existed at the time when the cheques were indorsed, one would have expected D.W.9 to have mentioned it to Mr. Braine. He did not. Again, on the 8th of April when the overdraft was called in, one would have expected MacPhail to have informed the defendant to either stop payment or to demand for the return of the cheques on the evidence of D.13. They did not. The court is now asked to believe that the defendant, a relative and close business associate of the directors of MacPhail and whose cheques had been dishonoured on presentation by his bankers on the 8th of April, was in complete ignorance of the fate of his cheques when on the 26th of April he instructed his solicitor to write to MacPhail with reference to D.13 and to ask for the return of the cheques. Again, on receipt of this letter the managing director instead of pointing out, as now alleged, that the indorsement of cheques had been obtained by fraud and duress and demanding their immediate return, merely forwarded a copy of the letter confirming the agreement as stated in D.13. Why was it necessary to confirm the agreement if the facts as claimed by D.W.9 had already been conveyed to Mr. Braine when the cheques were indorsed? Why were not the accusations of fraud and duress then made? It would appear that even at that stage, the idea of fraud and duress as a possible excuse for indorsing the cheques had not occurred to anyone. D.13 therefore bears all the hallmarks of a faked document. The obvious answer, therefore, to the question why the terms of the alleged agreement was not reduced to writing could be that neither party wanted to disclose in writing the true nature of the agreement.

Six undisputed facts emerge from the evidence. First, the brokers executed orders for the purchase of shares before the purchase price was paid by their clients; second, that in March 1965, MacPhail was solely dependent upon credit facilities granted by the plaintiff to carry on their business; third, that there had been a continuous shortfall in value of securities held by the plaintiff; fourth, that the plaintiff had notified MacPhail that unless the shortfall was made good no further credit would be granted resulting in the overdraft being called in; fifth, that the only means then available to MacPhail, short of getting some other person acceptable to the plaintiff to sign a guarantee, was to deposit cheques drawn by third parties in favour of MacPhail; and sixth, that the plaintiff accepted cheques as overnight securities without the same being indorsed. In the circumstances, the temptation to tide over immediate difficulties by depositing cheques drawn in favour of MacPhail would have been irresistible. However, such a scheme would have required the co-operation of a third party. Only a person who was in some way under obligation to MacPhail or interested in the continuance of the business or a close relative would have agreed to co-operate if given an assurance that the cheques would not be presented for payment. The category of such persons would include the remisiers working for the firm and certainly the wife of a director who is also an employee of the firm. It is also to be expected of a remisier who is a relative of the directors to contribute more than the other remisiers. So we find that out of amounts totalling $149,679.58 secured by cheques deposited as overnight securities, the wife of D.W.9 and the three remisiers employed by MacPhail between themselves issued cheques for the total sum of $108,318.72, with the defendant's share amounting to $72,591. Three other cheques totalling $41,320.86 were also deposited as overnight securities and the amount was said to consist of advances paid for the purchase of shares by two clients who were not called as witnesses. If, indeed, the cheques were given for the purchase of shares, then they must have been deposited by MacPhail as overnight securities without the consent and knowledge of their clients.

The defendant has not proved to my satisfaction that the cheques in question were held by MacPhail as security for the payment of the purchase price of shares ordered by clients. Although six witnesses have testified that they had placed certain orders which were subsequently cancelled, none of them had said that the relevant cheques were issued in respect of their orders. Nor do the amounts for which the cheques were drawn tally with the prices quoted by the witnesses. The total value of shares

ordered to be purchased was $81,644 as against the sum of $72,591 secured by the cheques. The defendant gave no explanation for the discrepancy, but the managing director of MacPhail said that the amounts entered in the cheques represented 80% of the purchase price. But why 80% and not 100%; and why 80% at all when the risk involved is only the difference between the buying price and the selling price of the shares? However, $72,591 is neither 100% nor 80% of $81,644 and the basis for the calculation remains unexplained. On the evidence before me, I have come to the conclusion that the amounts entered in the cheques are fictitious sums and that the cheques were delivered by the defendant after effecting certain alterations to render them void as negotiable instruments, in order to assist MacPhail to obtain credit from the plaintiff to carry on their business.

There are a number of extraordinary facts relating to these cheques, the cumulative effect of which, in my opinion, establish (a) that from the very first the six cheques were drawn and issued by the defendant for the purpose of being used by MacPhail as overnight securities; (b) that the cheques were deliberately tampered with in order to render them void as negotiable instruments; and (c) that the defendant issued the cheques for a dishonest purpose.

With regard to point (a), the evidence reveal that the amounts secured by at least 5 of the 6 cheques were entered in the overnight statement a day before the cheques were signed and issued. The cheques D.2 and D.4 drawn by the defendant in favour of MacPhail for $10,500 and $14,400, respectively, were originally dated 5th March 1965 and subsequently altered to 25th; but the date on the respective cheque butts D.1 and D.3 remain unaltered. The amounts secured by these cheques are however shown in the overnight security statement P.25 on the 4th of March. Again, D.6 for $13,075 is dated 9th March and was subsequently altered to March 29th whereas the date on the relevant butt D.5 remains unchanged. The amount is shown in the overnight statement of the 8th March as evidenced by A9. And, finally, D.10 and D.11 for $13,190.43 and $12,080.57, respectively, dated 11th March were subsequently altered to the 24th and 29th March respectively. The date on the relevant butts D.7 and D.8 remain unaltered. The amount secured by these cheques are entered in the overnight statement of 10th March as evidenced by A13.

The explanation given by D.W.9 for entering the amounts in the overnight statement a day before the cheques were signed is that the cheques were probably postdated. Since the cheques, according to the defendant, were not meant to be presented for payment, there could have been no conceivable reason for postdating them, and in each case to the next day. On the other hand, the defendant's evidence on this point is unequivocal and I quote:—

> "I signed the cheque as on the same day as appears on the butt. It is not possible that the date had been altered when I signed the cheque."

It would appear as if someone in order to keep the shortfall within a reasonable limit so as not to unduly attract attention was in a hurry to enter certain sums in the overnight statement as purporting to be secured by cheques even before the cheques were signed by the drawer. The reason for the cheques being signed a day later could be that when the extent of the shortfall was discovered at the close of business each day, the drawer, who in this case is the defendant, was not available because he also worked as a clerk in another firm. This fact could explain the reason why the defendant had to leave his cheque book with MacPhail and the entries in the cheques and the cheque butts had to be in different handwriting and none in his own except for his signature. It could be that the entries in the cheque butts were made on the same day as the relevant entries were made in the overnight statement, but either as a result of stupidity or lack of foresight in regard to a minor detail, the date on the cheque butts were postdated to the next day when the cheques were to be written by another clerk and handed to the defendant for his signature. This is, of course, a conjecture but a conjecture which neatly fits in with the documentary evidence and the surrounding circumstances.

To advert to my earlier conjecture that someone was anxious to keep the shortfall within reasonable limits, a glance at the entries in the overnight statements P.25 and A5 to A49 would suffice to explain the situation. On the evening of the 4th March 1965, the shortfall as evidenced by P.25 would have amounted to $41,606.29 had not the amounts secured by D.2 and D.4 for $10,500 and $14,400, respectively, been entered in the overnight statement and the shortfall reduced to $16,706.29. Had the shortfall been allowed to remain at $41,606.29, what would have been the consequence could only be a matter for speculation; but we know that when the shortfall reached the figure of $40,475.73 on the evening of the 30th of March as evidenced by A47, the plaintiff took immediate steps to realise the securities. The same procedure and pattern of behaviour is apparent in respect of the other cheques. By entering the amounts secured by D.6 on the 8th of March in A9, the shortfall was reduced from $26,002.27 to $12,927.27. Again by entering the amounts secured by D.10 and D.11 on the 10th of March in A13 the shortfall was reduced from $28,388.40 to $3,117.40. And, finally, by entering the amount due on D.12 on the 23rd of March in A35, the shortfall was reduced from $38,968.51 to $29,623.51.

With regard to point (b), the alteration of the dates in the cheques are admitted but the defendant and the directors of MacPhail have denied any knowledge of the alteration. The implication of their evidence is that the alterations were made after the cheques were indorsed and handed over to the plaintiff. The idea is totally absurd as the plaintiff could not have had any motive for destroying the securities. The only party who would have been interested in mutilating the securities is the defendant and/or the directors of MacPhail in furtherance of a conspiracy. It is significant that the alterations appear to have been made with the object of drawing attention to them. In the case of D.11, the effort appears to have been carried to the extent of even using red ink to effect the alteration. However, it would appear as if the overnight securities were never examined by the security clerk employed by the plaintiff; for had he done so he would not have failed to note the absence from the bundle of overnight securities of D.2 and D.4 on the night of 4th March, of D.6 on the night of 8th March and of D.10 and D.11 on the night of 10th March. He must have accepted the particulars shown in the accompanying statement in good faith. Nor did Mr. Braine who had the cheques indorsed by D.W.9 observe the alterations presumably because he was more preoccupied in getting the cheques indorsed. In the circumstances, it would appear as if the alterations were deliberately made to render the cheques void as negotiable instruments.

With regard to point (c), the defendant had the following to say and I quote:—

> "I was afraid that MacPhail & Co. would present the cheque for payment and so I sought confirmation from them that they would not present it. My real fear was that if the cheques were presented, I may be charged of a criminal offence for not signing the cheques with my proper signature. I admit I deliberately did not put my normal signature."

In short, the defendant's statement is a brazen admission that he had intended to cheat MacPhail of their securities. Hence the fear of a criminal prosecution. But the admission is far too naive to be taken seriously. The court is asked to believe that MacPhail with whom the defendant had worked for three years were not familiar with his signature and had permitted themselves to be duped. Even a stranger would have suspected that the signatures were not genuine when the cheques are signed some in English and some in Chinese; but all drawn upon the same bank. However, from defendant's admission one could judge his character. If he was capable of cheating MacPhail it would not have been beyond his capacity to join the directors in a conspiracy to obtain credit from the plaintiff by fraud.

From the facts of this case as I find them, it would appear as if the appropriate claim to be brought would lie in tort for damages arising out of a conspiracy between MacPhail and the defendant to obtain credit from the plaintiff by false representation. Be that as it may, I am however compelled by law to decide this case on the pleadings which envisage a claim for money due on negotiable instruments by a holder in due course.

The defence in this action falls under four heads, namely:—

(1) That the cheques were taken without consideration;

(2) That the cheques were taken under circumstances of duress and fraud and not in good faith;

(3) That the cheques are void as negotiable instruments because of material alterations; and

(4) That the action is not maintainable in law as the plaintiff had obtained a judgment in Ipoh High Court Civil Suit No. 125 of 1965 in respect of the same debt against MacPhail.

The questions raised in item (1) and (2) above constitute one plea, namely, that the plaintiff is not a holder in due course. Cheques are, of course, bills of exchange and a holder in due course is defined by section 29(1)(b) of the Bills of Exchange Ordinance No. 75 of 1949 as one who had taken the bill in good faith and for value and had no notice at the time of the negotiation of any defect of title of the person who negotiated it.

On the question of consideration, counsel for the plaintiff submitted that in the case of negotiable instruments consideration could be presumed by virtue of the provisions of section 30 of the Bills of Exchange Ordinance but counsel for the defendant contended, on the authority of *The Westminster Bank Ltd.* v. *Zang*,[1] that no such presumption would arise in respect of a cheque paid into a client's account against which no withdrawal was made or permitted. There is no need for me to go into the question of consideration since the facts are sufficiently clear. It is admitted that no advances were made to MacPhail on the overdraft account after the cheques were indorsed. It is equally clear that after the cheques were indorsed they were accepted in respect of an antecedent debt, which is valuable consideration within the meaning of section 27 of the Bills of Exchange Ordinance.

I was urged to hold that the plaintiff was not a holder in due course as the indorsement of the cheques was not accompanied by delivery. I was referred to section 2 of the Bills of Exchange Ordinance in which "indorsement" is defined as indorsement completed by delivery. It was urged that as the cheques had been impounded by the

plaintiff's manager before they were indorsed, there could have been no "indorsement completed by delivery". For the meaning of the word "delivery" I was referred to page 426 of *Sanjiva Row's* "The Negotiable Instruments Act" (5th Edition), where the learned author says, delivery means "transfer of possession actual or constructive, from one person to another". It would further appear that the delivery should be made in order to give effect to the instrument. That, in my opinion, is exactly what happened in this case. After indorsing the cheques D.W.9 handed them back to the plaintiff's manager without protest and since I have held that he indorsed them voluntarily, the intention that effect be given to the indorsement must be presumed.

I have already expressed my views on the question of fraud and duress. The onus of proving fraud or duress lies upon the party alleging the same, and in this case upon the defendant. I hold that he has failed to discharge that onus.

I shall, for the sake of convenience, refer to the question of material alteration before considering the questions of good faith and notice of defect of title. By virtue of the provisions of section 64 of the Bills of Exchange Ordinance, alteration of date will relieve all parties liable under a bill except a party who had himself made, authorised or assented to the alteration. I have already dealt with the facts and drawn the conclusion that the alteration of dates in the relevant cheques were done deliberately in order to render them void as negotiable instruments; and that the only party who stood to gain by the alteration is the defendant. I have no hesitation in holding that the alteration was done either by the defendant himself or someone acting on his instructions. Therefore his defence based on material alteration must fail.

Good faith and notice of defect of title can conveniently be dealt with as they are interrelated. The transactions in regard to the cheques in this case are replete with irregularities. The acceptance of cheques as overnight securities was done in contravention of the terms laid down by the plaintiff's head office. Under item 2 of P.23 MacPhail was permitted to replace share scrips already deposited as securities by fresh share scrips or by cash. Later, it would appear, cheques drawn by third parties were accepted in lieu of cash. This change was initiated by Mr. Richardson, a former manager of the plaintiff bank. It would appear from the evidence of D.W.7, that Mr. Richardson had agreed to accept cheques drawn by third parties in favour of MacPhail as overnight securities with a promise not to present them for payment in return for certain favours in the form of entertainment. It would also appear that the cheques were deposited merely for the purpose of accounting to the head office. Mr. Richardson is an expatriate who had retired from service and has left the country. On the evidence before me, I am unable to come to any conclusion as to the part played by Mr. Richardson but D.W.7 stands self-condemned as a party to a conspiracy to circumvent the terms offered by the head office.

When Mr. Braine took over the management he seems to have accepted the change initiated by Mr. Richardson as a *fait accompli*. Cheques drawn by third parties were accepted as security without indorsement, without scrutiny and without question as to the identity of the drawer. Mr. Braine admitted that the cheques were delivered by clients of MacPhail for the purchase of shares. On this point his evidence is as follows:—

> "These cheques had been brought to the bank and taken back daily since 5th March 1965. I did not put myself on enquiry why third parties' cheques should be sent to the bank. By that I mean I did not enquire as to the credit of the owner. I did not make enquiries as to why these cheques were issued; I was told that these were deposited by MacPhail's customers. I did not enquire as to why they were deposited. I was informed that the cheques were given for the purchase of shares. The overnight facilities were run on a trust basis and therefore I did not enquire further."

Admittedly, the plaintiff had notice that the cheques were given to MacPhail for the purchase of shares. Although factually it may not be true, had the plaintiff's manager probed into the matter further he would have discovered that the cheques were given by the defendant to MacPhail for no consideration at all; or if he had taken the trouble to scrutinise the cheques he would have found them apparently worthless as negotiable instruments by virtue of the alteration of the dates. It does not appear to have occurred to him that to lend money on the security of unindorsed postdated cheques was even less secure than advancing money on a promissory note. Said Lord Lyndhurst C.B. in *Stiles* v. *Guy*.[2]

> "But a security by a promissory note is, in proper interpretation no security at all — it is merely evidence of a debt; and of so little value does this court consider such securities, that if a testator directed his trustees to lay out money in securities approved by them, and they were to invest such money on the mere security of a promissory note, it would be such a breach of trust as to render the trustees liable for the amount of any loss that might be sustained."

In the instant case, when Mr. Braine permitted MacPhail to draw upon the overdraft account on the security of postdated cheques, he took upon himself the risk of doing something in excess of the terms offered by the head office and should have therefore taken every step possible to satisfy himself of the financial standing of the drawer and as to whether the cheques were taken by MacPhail for value or not. He frankly admits that he did not and that he merely accepted the cheques in good faith. I have no doubt that he

acted honestly but he appears to have acted hastily, probably because he was aware of the impending crash of MacPhail. There has been, in my opinion, a wilful blindness and absence of enquiry on his part in accepting the cheques.

Where the holder of negotiable securities otherwise *bona fide* and for value takes from a person whom he knows or suspects to have a merely limited interest he acquires no larger interest than him from whom he had taken. This principle was applied in *Earl of Sheffield* v. *London Joint Stock Bank.*[3] The facts of that case are simple. A moneylender obtained advances from various banks on the security of share scrips with accompanying transfers signed in blank, deposited with him by a client as security for a loan. The securities in fact did not belong to the client but were loaned to him by a third party for the purpose of pledging them for the loan. Subsequently, the banks sold some of the securities and applied the proceeds in satisfaction of the amount due and owing to them. In an action brought by the third party against the banks for the recovery of the proceeds of sale of the shares and for the return of the remaining scrips, it was held by the House of Lords reversing the judgment of the Court of Appeal, that though the banks had acquired the legal title to the securities, they were not purchasers for value without notice and were therefore bound to pay the amount realised from the sale of securities less the sum due and owing by the original borrower to the moneylender and to return the unsold securities. It was held that the character of the transaction between the moneylender and the banks was by itself, sufficient to notify to them that his interest was limited. In the instant case, the character of the transaction in respect of which the cheques were alleged to have been issued was actually communicated to the bank manager. He knew that the cheques were given for the purpose of buying shares but he did not enquire or care to enquire whether consideration had passed by the purchase and delivery of the shares.

It must follow from the principle enunciated in the abovementioned case that where the original holder could not have successfully maintained an action on the cheques, then the subsequent holder who is a purchaser for value with notice cannot be placed in a better position. In this case MacPhail could not have successfully maintained an action against the defendant as the cheques were not accepted for value.

In view of my finding, it is not necessary for me to consider the question as to whether or not the plaintiff is barred by law from maintaining this action by virtue of the judgment obtained by plaintiff in Ipoh High Court Civil Suit No. 125 of 1965 against MacPhail.

The action is dismissed with costs.

Action dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; N. Sharma.*

Re application of LAU SWEE SOONG; LAU SWEE SOONG v. GOH KENG SWEE & ANOR.

[O.C.J. (Choor Singh J.) September 11, 1967]

[Singapore — Originating Motion No. 36 of 1967]

Contempt of Court — Comments prejudicial to applicant in a pending criminal trial — Statement by Minister to newspaper — Prevailing circumstances — Duty of government to maintain law and order and to give information — Duty of government Minister — Statements to public — Matters of public interest — Courts of Judicature Act, 1964, s.25(2) — R.S.C. Prelim. Rules r.2 & O.LII.

This was an application by originating motion for committal orders for contempt of the Second Criminal District Court against two Ministers of Government for making and publishing statements prejudicial to the applicant in his pending trial in the said court.

A riotous demonstration took place outside the City Hall on November 4, 1966 and out of such incidents the applicant was arrested, charged, and was awaiting trial.

While such trial was pending press statements were issued by the respondents or their Ministries and broadcast and given publicity by Government medium of radio and television in respect of these rioting incidents.

It was alleged by the applicant that the effect of these impugned statements which were brought out in extenso at the trial had a tendency to obstruct the proper course of justice and to prejudice his trial.

Held: (1) the test is whether the matter complained of was calculated to interfere with the course of justice. Intention or knowledge of the author of the statement is irrelevant;

(2) in applying the law of contempt it is necessary not to lose sight of prevailing circumstances and local conditions;

(3) it is the duty of the government to maintain law and order and keep the public informed;

(4) there was nothing in the statements complained of which directly or indirectly identified the applicant as one of the rioters;

(5) the statements were not calculated to prejudice the fair trial of the applicant;

(6) even if the statements were in fact calculated to prejudice the fair trial of the applicant, the contempt of court was not such a contempt as would justify interference by way of the summary procedure adopted in this case. The court should exercise its jurisdiction only when the risk of interference with the proper administration of justice is a real and grave one.

Per Curiam: To suggest that the Government should not give information to the public by radio and television on matters of great public interest relating to the maintenance of law and order is simply to demand the abandonment by the Government of their duty and the surrender of their authority. To grant a committal order in these proceedings and thereby restrain the